NO. 20,359

IN THE

United States
Court of Appeals
For the Ninth Circuit

ARNOLD A. SMITH and RACHAEL SMITH, his wife; and HERBERT SMITH and EVELYN SMITH, his wife,

Appellants

v.

UNITED STATES OF AMERICA,

Appellee

ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF AND APPENDIX FOR THE APPELLEE

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The opinion and order of the District Court dismissing the original complaint (R. 5-7) are reported at 243 F. Supp. 222 (Ariz.). The opinion and order of the District Court dismissing the amended complaint (R. 20-23) are not yet officially reported.

JURISDICTION

This appeal involves a claim against the United States for the rental value of leased premises. The appellants brought this action on December 7, 1964 (R. 1-3), alleging jurisdiction in the District Court under

28 U.S.C., Section 1346(a) (2). On April 7, 1965, the District Court granted the Government's motion under Rule 12(b) (6), Federal Rules of Civil Procedure, (R. 4) to dismiss the complaint for failure to state a claim upon which relief can be granted (R. 5-7, 31). An amended complaint was filed on April 13, 1965, alleging jurisdiction under 28 U.S.C., Section 1346(a) (2). (R. 8-11). The judgement of the District Court dismissing the amended complaint for the failure to state a claim upon which relief could be granted was entered on August 3, 1965. (R. 24). Within sixty days thereafter, on August 4, 1965, a notice of appeal was filed. (R. 26). Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Whether the District Court was correct in dismissing for failure to state a claim the landlord-appellants' complaint against the United States seeking the rental value of leased premises where the United States had seized the property of the tenant-taxpayer in possession of the leased premises for the nonpayment of taxes.

CONSTITUTION AND STATUTES INVOLVED

These may be found in the Appendix, *infra*.

STATEMENT

The appellants' original complaint alleged that during and prior to May, 1964, the appellants were the owners of certain real property located in Phoenix, Arizona. Prior to May 8, 1964, the appellants leased the real property, consisting of land, a warehouse and office building, to Lichty Printing and Business Forms, Inc., for rental of $1,350 per month, or $45 per day. In May of 1964 the tenant was in arrears and owed back rent for a number of months. (R. 2.)

On May 8, 1964, the Government, through its agent, the Internal Revenue Service, took possession of the

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On May 8, 1964, the Government, through its agent, the Internal Revenue Service, took possession of the

premises and padlocked the premises in order to levy upon and seize the property of the tenant-taxpayer for taxes owed by the tenant-taxpayer. (R. 2.) On the same date the appellants advised the Government that they were the owners of the premises and would look to the Government for rent in the sum of $45 per day so long as the Government occupied and used the premises. (R. 2-3.) On October 21, 1964, the Government relinquished possession of the premises. (R. 3.)

Based upon the above facts the appellants contended under two related theories that they were entitled to rent from the United States for the period during which the Government occupied the leased premises. First, they contended that the Government was liable upon an implied contract to pay rent of $45 a day. In the alternative, they contended that the Government was liable in damages at the rate of $45 a day for the taking of their private property for public use without just compensation. (R. 3.)

The Government moved to dismiss the original complaint for the failure to state a claim upon which relief can be granted. (R. 4.) The District Court granted the motion to dismiss (R. 5-7), holding that an action against the Government under an implied contract must be based upon a contract implied in fact and that the continued occupation by the Government after the Government was informed that the appellants would look to it for rent "did not in itself support a finding of an implied contract between plaintiffs and defendant to pay rental for the premises occupied by defendant" (R. 6.). The District Court further held that there was no taking of any property of the appellants because (R. 7) —

> At the time of the occupancy by the defendant the only party in possession and having a right to possession was the tenant, Lichty. Thus, in effect, defendant intending only to seize the property of the tenant, Lichty, could not be said to have seized the property of the plaintiffs.

The appellants thereafter filed an amended complaint (R. 8-11) containing only three added allegations. The appellants alleged that, because the tenant was in arrears on his payment of rent, the lease provisions (R. 16-17) and Section 33-361, 11 Arizona Revised Statutes Annotated (1956), gave the appellants the right to regain possession of the premises (R. 9). The appellants also alleged that on the date of the Government's seizure of the tenant's property the appellants demanded possession from the Government (R. 10), in addition to advising the Government that they would look to the Government for rent. Lastly, the appellants elaborated the alleged taking and alleged that the Government deprived the appellants "of their right to reenter the premises, dispossess the tenant and take possession of the premises." (R. 10.)

The Government moved to dismiss the amended complaint (R. 12) and attached a copy of the lease between the appellants and their tenant Lichty Printing (R. 13-19) to the motion. The District Court granted the motion to dismiss, holding that (R. 22-23) —

> In viewing the amended complaint in the light most favorable to the plaintiffs, it does not appear therefrom that at the time of the taking, or thereafter, plaintiffs had any right to the possession of the premises as against the tenant, Lichty. This, because it does not appear from the pleadings that the plaintiffs exercised any of their rights against the tenant, Lichty, which would place the possession of the premises in the plaintiffs. The defendant, therefore, seized only the property of the tenant, Lichty, which it was entitled to do under the law.

The appellants have appealed to this Court from the judgment below. (R. 26.)

SUMMARY OF ARGUMENT

The appellants, as landlords, are seeking recovery against the United States for the rental value of their leased premises. The appellants had leased their premises for a term of fifteen years to Lichty Printing. On May 8, 1964, the Government seized the personal property of the tenant-taxpayer situated on the leased premises for the nonpayment of federal taxes and padlocked the premises to effectuate the seizure. The appellants sought recovery on grounds of both an implied contract by the Government to pay rent and a taking of private property for public use without just compensation.

The tenant owed the appellants a considerable amount of back rent at the time of the seizure of the tenant's property. However, the appellants concededly had not then exercised their rights under the lease or under the Arizona statutes to terminate the lease for the nonpayment of rent. Moreover, the appellants did not allege any attempt to terminate the lease thereafter while the premises were padlocked. Thus, during the entire period in question, the tenant, not the appellants, had the right to possession of the premises. Therefore, the Government did not interfere with either the possession or right to possession of the landlord-appellants, for until they took action to terminate the lease the appellants did not have the right to possession of the premises. Thus, there was no taking by the Government of any property of the landlord-appellants.

The landlord-appellants had a simple remedy at hand. So long as the landlords did not exercise their right to terminate the lease, they cannot convert the Government, as a creditor levying upon tax-liened

property on the leased premises, into a tenant. There was no actual agreement, either express or implied-in-fact, on the part of the United States to pay rent to the appellants.

Therefore, the District Court correctly dismissed the amended complaint for failure to state a claim upon which relief could be granted.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE UNITED STATES WAS NOT LIABLE FOR ANY RENT, SINCE IT SEIZED ONLY THE TENANT-TAXPAYER'S RIGHT TO POSSESSION UNDER A CONTINUING LEASE WHICH WAS NOT TERMINATED BY THE LANDLORDS AND DID NOT ITSELF AGREE TO PAY THE RENT DUE FROM THE TENANT OR SEIZE ANY PROPERTY OF THE LANDLORDS.

A. *The United States seized only the possession of the taxpayer-tenant under a continuing lease.*

The issue presented in this case is a narrow one. Described by the appellants themselves (Br. 4), it is whether the United States can be held liable for rent when it uses the leased premises for the storage of personal property of a tax delinquent tenant seized on the premises when the landlord, although entitled to terminate the lease, remove the tenant and take possession of the premises, does not in fact do so, but merely gives notice to the United States demanding possession or rent. The cases are clear enough that the landlords cannot by this procedure convert the United States into a tenant or claim that their property was taken for public use. The United States did not take possession from the landlords, but from the tenant. It did

not seize the landlords' reversion, but the tenant's possession.

The appellants had at hand a simple remedy under state law (Section 33-361, 11 Arizona Revised Statutes Annotated (1956), Appendix *infra*) and under the lease provisions (R. 16-17) whereby they could have quickly terminated the lease and secured possession from the tenant. The appellants concede that they did not exercise their rights to recover possession of the premises before the Government seized their tenant's personal property. (Br. 13.) Nor did the appellants allege that they took any action thereafter during the period in question to terminate the lease with their tenant and regain possession of the premises. (R. 22-23.) The landlords cannot keep the lease in existence and seek to hold the United States for using the tenant's leasehold rights in order to store property on the premises belonging to the tenant which had been seized for a tax debt.

The decision below rests on clear and practical sense, affording the landlords the right to compel the United States either to remove the seized property from the premises or pay rent by a simple exercise of their right to terminate the lease. The landlords cannot secure from the Government rent due from a tenant who is in default to them for rent and to the United States for taxes, just because the United States is enforcing its creditor's rights in the tenant's property located on the leased premises. The appellants' brief nakedly argues that they should collect rent from the United States simply because they were entitled to terminate the lease and secure possession, even though in fact they did not do so.

The decided cases give ample support to the decision below. *Hirsch* v. *United States,* 170 F. Supp. 229 (E.D.

N.Y.), and *Roxfort Holding Co.* v. *United States,* 176 F. Supp. 587 (N.J.), are directly in point and in accord with the decision below. The cases relied upon by the appellants are distinguishable since, unlike the case at bar, they involved cases either where the lease was terminated (*Feldwin Realty Co.* v. *United States,* 169 F. Supp. 73 (N.J.); *United States* v. *Caruso* (W.D. Pa.), decided December 31, 1958 (3 A.F.T.R. 2d 515); *Carroll* v. *United States,* 229 F. Supp. 891 (W.D. Ark.)), where there was an express agreement on the part of the United States to pay rent for a prior period (*Maryland National Bank* v. *United States,* 227 F. Supp. 504 (Md.)), or where the United States seized possession of the premises directly from the owner with no leasehold interest whatever being involved (*Johnson* v. *United States,* 2 Ct. Cl. 391; *Buffalo & Fort Erie Public Bridge Au.* v. *United States,* 65 F. Supp. 476 (Ct. Cl.); *Niagara Falls Bridge Commission* v. *United States,* 76 F. Supp. 1018 (Ct. Cl.); *Etheridge* v. *United States,* 218 F. Supp. 809 (E.D. N.C.)).

For the purposes of the Government's motion to dismiss all of the well-pleaded facts are admitted as true, while conclusions of law or unsupported deductions of fact are not admitted. *Ott* v. *Home Savings & Loan Assn.,* 265 F. 2d 643, 648 (C.A. 9th); *Interstate Nat. Gas Co.* v. *Southern California Gas Co.,* 209 F. 2d 380, 384 (C.A. 9th); 2 Moore's Federal Practice Second ed.), par. 12.08. The appellants, under the admitted facts, had no right to the possession of the premises absent some action to terminate their lease with the tenant, and hence can prove no set of facts in support of their claim which would entitle them to relief. See *Conley* v. *Gibson,* 355 U.S. 41, 46-47.

B. *There was no actual agreement by the United States to pay rent to the appellants for the premises.*

The Tucker Act[1] allows recovery against the United States "upon any express or implied contract." 28 U.S.C., Section 1346(a)(2), Appendix, *infra*. As the Supreme Court said in *United States* v. *Minn. Investment Co.*, 271 U.S. 212, 217 —

> An impiled contract in order to give the Court of Claims or a district court under the Tucker Act jurisdiction to give judgment against the Government must be one implied in fact and not one based merely on equitable considerations and implied in law.

Hence the appellants must show an express or implicit agreement by the United States which was breached, for a contract implied in fact is an actual contract based on the mutual agreement of the parties. *Alabama* v. *United States*, 282 U.S. 502, 506; *First National Bank of Emlenton, Pa.* v. *United States*, 265 F. 2d 297, 300 (C.A. 3d). The distinction between contracts implied in law and those implied in fact is set out in 1 Williston on Contracts (Third Ed., 1957), Section 3:

> The expression "implied contract" has given rise to great confusion in the law.* * * Some of these rights [enforced by contractual actions], however, were created, not by any promise or mutual assent of the parties, but were imposed by law on the defendant irrespective of, and sometimes in violation of, his intention. Such obligations were called implied contracts. Another name is that now generally in use of "quasi contracts." This expression makes clear that the obligations in question are not true contracts, and it also avoids confusion with another class of obligations which have also been called implied contracts. This latter class consists of obligations arising from mutual agreement and intent to promise but where the agreement and promise have

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1 Sections 1 and 2 of the Act of March 3 ,1887, c. 359, 24 Stat. 505, popularly known as the Tucker Act, were statutory forerunner of 28 U.S.C., Section 1346 (a)(2).

> not been expressed in words. Such transactions are true contracts and have sometimes been called contracts implied in fact.

The appellants have not alleged any facts which would give rise to an inference of any actual agreement by the Government to pay rent to them as landlords. Rather, their claim is based solely on the Government's continued occupation after demand by the appellants for possession or rent so long as the Government occupied the premises. (Br. 6-7.) As the District Court below held (R. 6), "The fact that the Internal Revenue Service continued to occupy the premises thereafter did not in itself support a finding of an implied contract between plaintiffs and defendant to pay rental for the premises occupied by defendant." There was no manifestation by the Government of any intention to promise to pay rent to the appellants. As the court said in *Hirsch* v. *United States, supra,* p. 232 —

> An agreement for the use and occupation is not implied by the mere showing of occupation of the premises, without proof of some circumstances authorizing an inference that the parties intended to assume the relationship of landlord and tenant toward each other, * * *

The appellants were in a landlord and tenant relationship during the time period involved with Lichty Printing as the tenant under the lease.

Some cases have allowed a recovery against the Government under a theory of implied contract where there has been a taking of private property for public use without just compensation. *Johnson* v. *United States,* 2 Ct. Cl. 391; *Buffalo & Fort Erie Public Bridge Au.* v. *United States,* 65 F. Supp. 476, 486 (Ct. Cl.); *Niagra Falls Bridge Commission* v. *United States,* 76 F. Supp. 1018 (Ct. Cl.); *Etheridge* v. *United States,* 218 F. Supp. 809, 813 (E.D. N.C.). In all of these cases the Govern-

ment took possession of the premises from the owners, with no leasehold interest being involved. The theory of recovery is based on the legal doctrine that the sovereign can do no wrong, and hence has impliedly agreed to pay for the use under the taking. *Johnson* v. *United States, supra,* p. 415; *Alexander* v. *United States,* 39 Ct. Cl. 383, 393. See *State of California* v. *United States District Court,* 213 F. 2d 818, 821, where this Court questioned this theory of recovery. The appellants concede that they are contending for this type of implied contract, which is based solely upon a taking of their property by the Government. (Br. 9.) The Supreme Court said in *United States* v. *Dickinson,* 331 U.S. 745 (p. 748):

> But whether the theory of these suits be that there was a taking under the Fifth Amendment, and that therefore the Tucker Act may be invoked because it is a claim founded upon the Constitution, or that there was an implied promise to pay for it, is immaterial. In either event, the claim traces back to the prohibition of the Fifth Amendment, "nor shall private property be taken for public use, without just compensation."

Hence, such a theory of recovery is possible only where there is a taking of private property without just compensation.

C. *The United States did not take any property of the appellants.*

At the time the Government seized the property of the delinquent tenant, Lichty Printing, the appellants had taken no steps to dispossess their tenant. (App. Br. 13.) The tenant then owed back rent for a number of months. (R. 9.) Under the fifteen-year lease (R. 13) the appellants had the right to cancel the lease and retake possession for the failure to pay rent, or the appellants could at their option continue the lease in

force and sue for back rent (R. 16-17). The appellants also had the right under Arizona law to recover possession for the nonpayment of rent by re-entry or by a summary action for recovery of possession. Section 33-361, 11 Arizona Revised Statutes Annotated (1956).

Again, the appellants at no time after May 8, 1964, the date of the seizure, exercised any of their rights against their tenant to regain the right to possession. (R. 22.) The appellants did not declare the lease to an end and cancel it under their lease right (R. 16-17); nor did the appellants bring summary proceedings to recover possession, even though the Arizona statute is clear that after a lease is terminated an action is available to the landlord against someone holding under the tenant (Section 12-1171(3), 4 Arizona Revised Statutes Annotated (1956), Appendix, *infra*). Thus, during the entire time period in question the tenant had the right to the possession of the premises under the lease. So long as the tenant retained the right to possession of the premises under the lease the appellants were in no position to demand the premises from the Government, for the appellants were not then entitled to possession of the premises.

The tenant, Lichty Printing, was in possession under a fifteen-year lease (R. 13), and was not a tenant by sufferance (App. Br. 13). A tenant by sufferance is a former tenant who holds over after the termination of his estate without the consent of the landlord. 1 American Law of Property (Casner ed., 1952), Sec. 3.32. As shown above, the appellants did not exercise any of their rights against the tenant to terminate the lease. (R. 22-23.) Therefore, the tenant cannot be said to be holding over after termination of its lease.

The appellants, although not in possession, retained the landlord's reversionary interest in the premises.

1 American Law of Property (Casner ed., 1952), Section 3.59. Therefore, they would be entitled to recover only for any taking that injured their reversionary interest. 2 Nichols, Eminent Domain (Third ed., 1963), Sec. 5.23, pp 58-61. See *Alexander* v. *United States,* 39 Ct. Cl. 383.[2] However, the temporary occupation of the premises by the Government to store the seized goods did not infringe on the landlord's reversionary interest where, as here, the appellants at no time took any action to recover the right to possession from their tenant. *Hirsch* v. *United States, supra,* p. 232; *Roxfort Holding Co.* v. *United States, supra,* p. 588. By not terminating the lease, the appellants retained throughout the time period involved the right to recover rent from their tenant, Lichty Printing.[3] Any recovery for a temporary taking that does not injure the landlord's reversionary interest inheres in the tenant alone. 2 Nichols, Eminent Domain, *supra,* Sec. 5.23. See *United States* v. *General Motors Corp.,* 323 U.S. 373; *Alexander* v. *United States, supra.*

The decided cases support the Government's contention that no taking occurred under the facts as alleged. *Hirsch* v. *United States,* 170 F. Supp. 229 (E.D. N.Y.), involved nearly identical and undisputed facts. A landlord was there claiming the rental value of premises occupied by the Internal Revenue Service to store the tenant's seized property. There, too, the landlord at no time acted to retake the right to possession from the tenant. The District Court said (p. 232):

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2 In *Alexander*, the Government temporarily occupied leased farm land during a typhoid epidemic and caused considerable damage to the land. The landlord was allowed to recover for the damage to its reversionary interest in the land, but was not entitled to any rental value for the time occupied. Rather, the tenant alone recovered for the temporary taking of its right to possession.

3 Indeed, under the lease the tenant also agreed to indemnify the landlords for any loss or expense caused the landlords by the placing of a lien on the premises. (R. 15)

> In summary, it appears that the defendant did not interfere with or take possession of the premises from the plaintiffs during the subject period of time for the simple reason that the plaintiffs were not in possession thereof. The tenant Geiger was in possession. The padlocking by the defendant violated no right of the plaintiffs. The plaintiffs were at liberty to oust the tenant and, incidentally its personal property, if they so elected. * * *

Appellants' reliance upon the first *Hirsch* decision (*Hirsch* v. *United States,* 120 F. Supp. 808 (E.D. N.Y.)), is misplaced. The first decision denied the Government's motion to dismiss where the landlord alleged that he had dispossessed the tenant. When it developed at the trial that he had not dispossessed the tenant, the trial court, consistently with the first decision, held that the landlord could not collect rent from the Government. Here, the appellants did not allege in their original complaint or in their amended complaint that they took any action to terminate their tenant's lease.

In *Feldwin Realty Co.* v. *United States,* 169 F. Supp. 73 (N.J.), the Government seized the property of a *former* tenant (a fact which appellants' brief does not mention (cf. p. 11)) situated on the landlord's property. The District Court allowed recovery and distinguished the *Hirsch* case on the grounds that (p. 76) in *Hirsch* the —

> landlord did not have any present right to the property seized; hence he could not claim that the Government seized his property. Therefore *Hirsch* has no bearing on the facts presented in this case.[4]

4 Recognizing that a landlord has the right to terminate the lease and regain possession, the Internal Revenue Service's internal administrative provisions (described in *Feldwin Realty, supra,* pp. 74-75) authorize revenue officers to enter into an agreement with the landlord to pay rent for the storage of levied property on the premises, even though the landlord has not yet exercised his rights to regain possession. However, where, as here, no agreement has been reached, the landlord must exercise his readily available rights to regain possession from the tenant before acquiring any claim against the Government for the leased premises.

In *Roxfort Holding Co.* v. *United States,* 176 F. Supp. 587 (N.J.), the same District Court that decided *Feldwin Realty Co.* was presented with a case where there was no action by the landlord to oust the tenant. The court followed *Hirsch* and did not allow any recovery against the United States. It said (pp. 588-589):

> There was no taking or interference with any property rights of the plaintiff-landlord which would warrant the award of compensation under the Fifth Amendment of the Constitution. In this respect, our case differs from *Feldwin Realty Co.* v. *United States,* D.C.D.N.J. 1959, 169 F. Supp. 73. There the Government levied upon the personality of a *former* tenant and thus interfered with the possessory rights of the owner of the premises. * * *

The cases relied upon by the appellants are not in point. As we have shown above, in *Feldwin Realty* the lease had already been terminated. In *Maryland National Bank* v. *United States,* 227 F. Supp. 504 (Md.), the Government expressly agreed to pay rent to the landlord for the period January 3, 1962, to January 24, 1962. The Government, however, remained in possession until February 8, 1962, and the landlord claimed rent from the United States for this latter period. Here, there was no express agreement by the United States to pay rent for any period.

In *United States* v. *Caruso* (W.D. Pa.), decided December 31, 1958 (3 A.F.T.R. 2d 515), the landlord seemingly had already moved against the tenant before the Government seizure, for the landlord had itself already seized the tenant's personal property for nonpayment of rent. The court without discussion allowed the landlord to recover against the United States for the rental value of the premises.

The above cases all involved the seizure by the Internal Revenue Service of the tenant's property for the

nonpayment of taxes. *Carroll* v. *United States,* 229 F. Supp. 891 (W.D. Ark.), involved the Small Business Administration as mortgagee of a tenant's cafeteria equipment. There the leased premises had been taken over by the tenant's trustee in bankruptcy. On May 29, 1963, the trustee abandoned all claims to the cafeteria equipment to the Small Business Administration, and the landlords were allowed to recover from the Government for the rental value for the period after the trustee abandoned the equipment. It is evident that in *Carroll,* the tenant's right to possession was terminated by its bankruptcy. In the instant case the record shows no termination of the tenant's right to possession.

As the above cases demonstrate, there is no valid claim by a landlord against the Government for the rental value of premises temporarily occupied by the Government where the tenant's right to possession has not been terminated. The appellants at no time made any attempt to exercise their right to recover the right to possession from their tenant, Lichty Printing. (R. 22.) Apparently they did not want to terminate their advantageous long-term lease with the tenant (R. 13) and desired to continue the lease and collect the back rent from their tenant in the hope that the tenant would pay its tax debt. It is inconsistent of them to contend here for the rental value of the premises against the Government, since any recovery would be based on an interference with their right to possession. The appellants had in fact exercised none of the available rights to regain the immediate right to possession.

The appellants' sole remaining argument is that the Government by padlocking the premises deprived them of the right to re-enter the premises. (Br. 14-15.) However, the lease required the appellants "to declare this lease to an end and cancel the same" in order to re-enter the premises. (R. 16-17.) The appellants have

not alleged any such cancellation or termination of the lease. In any event, as we have indicated above, the landlords retained and were free to exercise their right to terminate the lease by bringing a summary action for possession as provided by the Arizona statute, which they did not exercise. Thus, contrary to the appellants' assertion (Br. 15), they were not deprived of the right to regain possession of the premises and to rent the premises to someone else. The appellants chose not to exercise their readily available remedies under both the lease and the Arizona statutes.

As the court below held (R. 22-23) —

> In viewing the amended complaint in the light most favorable to the plaintiffs, it does not appear therefrom that at the time of the taking, or thereafter, plaintiffs had any right to the possession of the premises as against the tenant, Lichty. This, because it does not appear from the pleadings that the plaintiffs exercised any of their rights against the tenant, Lichty, which would place the possession of the premises in the plaintiffs. The defendant, therefore, seized only the property of the tenant, Lichty, which it was entitled to do under the law.[5]

Thus, taking all of the facts as admitted, the District Court correctly held that the appellants have failed to state a claim against the Government upon which relief can be granted under any right to recover under 28 U.S.C., Section 1346(a)(2).

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5 The appellants argue (Br. 14) that the District Court's reasoning would prevent recovery even if Lichty Printing were a trespasser. However, it seems clear that, if that were the case, the landlords would have had the immediate right to possession, which they did not have in the case before this Court.

refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

(c) *Successive Seizures.*—Whenever any property or right to property upon which levy has been made by virtue of subsection (a) is not sufficient to satisfy the claim of the United States for which levy is made, the Secretary or his delegate may, thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property liable until the amount due from him, together with all expenses, is fully paid.

* * * *

(26 U.S.C. 1958 ed., Sec. 6331)

28 U.S.C.:

Sec. 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

* * * *

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

* * * *

4 Arizona Revised Statutes Annotated (1956):

§12-1171. *Acts which constitute forcible entry or detainer*

APPENDIX

Constitution of the United States:

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Internal Revenue Code of 1954:

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401 (d)) of such officer, employee, or elected official. If the Secretary or his delegate makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary or his delegate and, upon failure or

refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

(b) *Seizure and Sale of Property.*—The term "levy" as used in this title includes the power of distraint and seizure by any means. In any case in which the Secretary or his delegate may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).

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* * * *

4 Arizona Revised Statutes Annotated (1956):

§12-1171. *Acts which constitute forcible entry or detainer*

A person is guilty of forcible entry and detainer, or of forcible detainer, as the case may be, if he:

* * * *

3. Wilfully and without force holds over any lands, tenements or other real property after termination of the time for which such lands, tenements or other real property were let to him or to the person under whom he claims, after demand made in writing for the possession thereof by the person entitled to such possession.

11 Arizona Revised Statutes Annotated (1956):

§33-361. *Violation of lease by tenant; right of landlord to re-enter; summary action for recovery of premises; appeal; lien for unpaid rent; enforcement*

A. When a tenant neglects or refuses to pay rent when due and in arrears for five days, or when tenant violates any provision of the lease, the landlord or person to whom the rent is due, or his agent, may re-enter and take possession, or, without formal demand or re-entry, commence an action for recovery of possession of the premises.

B. The action shall be commenced, conducted and governed as provided for actions for forcible entry or detainer, and shall be tried not less than five nor more than thirty days after its commencement.

* * * *